Mar 6 2000

Supreme Court, U.S.
FILED
MAR 6 2000
CLERK

Nos. 99-224 & 99-582

IN THE

Supreme Court of the United States

CHARLES B. MILLER, ET AL,
Petitioners,
v.
RICHARD A. FRENCH, ET AL,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
RICHARD A. FRENCH, ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court for Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

ALAN B. MORRISON
(Counsel of Record)
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington DC 20009
(202) 588 7720
Attorneys for Public Citizen

BEST AVAILABLE COPY

30pp

QUESTION PRESENTED

Are the constitutional restrictions on Congress' power to enact retroactive legislation violated in this case where the legislation provides for an automatic stay of final judgments if a federal judge does not decide a motion to terminate the judgment within the time prescribed by Congress?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

INTRODUCTION AND SUMMARY OF ARGUMENT . 2

ARGUMENT 5

THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THESE PROVISIONS OF THE PLRA ARE UNCONSTITUTIONAL. 5

I. BECAUSE THE PLRA IS CLASSIC RETROACTIVE LEGISLATION, IT MUST BEAR A HEAVY BURDEN, WHICH IT CANNOT SUSTAIN. 6

A. The Meaning of Retroactivity 6

B. This Court's Retroactivity Decisions Invalidate the PLRA 9

II. OF THE TWO PRINCIPAL CASES RELIED ON BY PETITIONERS, ONE (*PLAUT*) SUPPORTS THE FOREGOING RETROACTIVITY ANALYSIS, AND NOTHING IN THE OTHER (*WHEELING BRIDGE*) UNDERMINES IT. 17

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Bowsher v. Synar, 478 U.S. 714 (1986) 2

Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) 4, 10

INS v. Chadha, 462 U.S. 919 (1983) 2

Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998) 2

Johnson v. United States, 163 Fed. 30 (1st Cir. 1908) 6

Landgraf v. USI Films Products, 511 U.S. 244 (1994) 3, 7-8, 12, 13

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 15

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 4, 14

Lynch v. United States, 292 U.S. 571 (1934) 15

Martin v. Hadix, 119 S. Ct. 1998 (1999) 9, 11-12, 21

Mistretta v. United States, 488 U.S. 361 (1989) 2

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 22

Pennsylvania v. Wheeling & Belmont Bridge,
59 U.S. (18 How.) 421 (1856) 4, 20-22

Pennsylvania v. Wheeling & Belmont Bridge v. Pennsylvania, 54 U.S. (13 How.) 518 (1852) 20

Pension Benefit Guaranty Corp. v. R. A. Gray & Co.,
467 U.S. 717 (1984) 9

Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) 3, 17

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 16

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1991) 2

Taylor v. United States, 181 F.3d 1017 (9th Cir. 1999) 20

United States v. Klein, 80 U.S. (13 Wall) 128 (1872) .. 13-14

United States v. Winstar, 518 U.S. 839 (1996) 4, 12-13

STATUTES AND RULES

Prison Reform Litigation Act,
18 U.S.C. § 3626 1
Section 802(b)(2) 1, 2, 22, 23
Section 802 (e)(2) 1, 15, 22, 23
Section 803(d)(3) 8

Federal Rules of Civil Procedure
Rule 60(b) 5, 10, 14, 18, 21, 22, 23
Rule 60(b)(5) 21
Rule 65 ..... 10, 22

MISCELLANEOUS

Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1056 (1997) 7

The Supreme Court -- Leading Cases, Eastern Enterprises v. Apfel, 112 Harv. L. Rev. 212 (1998) 11

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS[1]

Public Citizen is a non-profit organization with approximately 150,000 members. This case raises important constitutional issues whose potential impact extends far beyond the prison litigation context that is directly at issue here. Public Citizen agrees with respondents that Congress' attempt in section 802(e)(2) of the Prison Reform Litigation Act, 18 U.S.C. § 3626 (the "PLRA"), to impose an automatic stay on a valid final judgment violates principles of separation of powers.

But the same principles that invalidate the automatic stay provision also invalidate section 802(b)(2) of the PLRA, under which existing final judgments, both litigated and consensual, may be altered at the request of defendants, even though there has been no underlying change in the facts or the applicable law that formed the basis of those judgments. Since the automatic stay provisions can only be justified as a means to assure the prompt implementation of section 802(b)(2), the invalidity of the latter provision would render the automatic stay provision invalid as well.

In this brief, which is submitted with the consent of the parties, *amicus* will discuss the principal separation of powers cases relied on by the parties, although with a somewhat different approach to them. It will also rely on other decisions of this Court in which the law being challenged had the same kind of impermissible retroactive effect that is contained in both sections 802 (b)(2) and (e)(2). Thus, the focus of this brief

---

[1] No person other than the *amicus curiae* and its counsel authored or made a monetary contribution toward the preparation or submission of this brief.

is on explaining why the PLRA violates this Court's long-standing rule that retroactive legislation is highly disfavored and is constitutionally suspect.

Through its Litigation Group, Public Citizen has provided counsel in many of this Court's most important separation of powers cases, including *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Mistretta v. United States*, 488 U.S. 361 (1989). Its attorneys were also co-counsel in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1991), which prompted Congress to pass the PLRA, and in the unsuccessful effort by the plaintiffs in *Rufo* to overturn section 802(b)(2), *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998). Its lawyers have in the past, and expect in the future, to represent plaintiffs (including prisoners) in lawsuits against agencies of the state and federal governments that may result in injunctive relief and/or consent decrees. If the PLRA is upheld, Congress may well extend its retroactive approach to other areas where governments find it inconvenient to abide by promises made to settle litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The PLRA changes the rules under which final judgments — whether based on a consent decree or a court ruling — may be altered to relieve both state and federal prison officials from their existing obligations. There is no disagreement that Congress made it much easier for those officials both to terminate existing court orders and to obtain stays of them until the courts have an opportunity to determine whether the existing orders should be continued. Nor is there any doubt that Congress did not attempt to change (not could it have changed) the substantive law under which those judgments were entered — the Eighth and Fourteenth

Amendments to the Constitution. We assume for purposes of this case that Congress may apply the PLRA to decrees entered after its effective date, although, as we argue *infra* at 22-23, even in that context the automatic stay provision violates separation of powers because it interferes with the ability of Article III judges to carry out their constitutionally assigned function of deciding cases on the facts and law, not based on legislatively-imposed deadlines. However, the principal issue presented in these consolidated petitions is whether Congress may constitutionally impose the PLRA retroactively to alter existing consent decrees and litigated final judgments.

The effect of the PLRA is no different than if Congress legislatively added an automatic termination date to existing decrees that contained no such provision. Although the PLRA theoretically allows respondents and other classes of prisoners to maintain their decrees, that can occur only if they can prove a current violation of federal law. Even that possibility cannot save the statute because requiring respondents to start over again deprives them of the benefit of the long-term bargains they struck when their decree was entered. Therefore, if the PLRA is upheld, respondents will have sacrificed their existing rights and obtained no more than the opportunity to bring another lawsuit.

The issue presented here is analytically identical to that in cases where this Court has carefully scrutinized attempts by Congress to alter existing rights by retroactive legislation. Although resolved on statutory grounds, *Landgraf v. USI Films Products*, 511 U.S. 244 (1994), spells out the constitutional considerations that determine whether the retroactive aspects of a law, such as the PLRA, will be upheld, including the breadth of the change in the law and the extent to which that change was foreseeable. In some cases, such as *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the rights of those affected by

a retroactive change in the law were embodied in a litigated judgment, while in others, such as *United States v. Winstar*, 518 U.S. 839 (1996), and *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), they were based on contractual arrangements like the consent decree at issue in many prisoner cases. And in others, such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the rights were not embodied in any written agreement, but were part of a general understanding of the kinds of protections that private parties have from governmental interference with their property. Although this Court has been willing to allow certain kinds of changes in existing rights, it has done so only after carefully weighing the legitimate expectations of the private party and the governmental interests at stake.

The PLRA was intended to eradicate rights to continuing relief granted prisoners in existing consent decrees, regardless of what they gave up in exchange for those rights, and with no showing of the kind of strong governmental interest that might justify such an invasion of respondents' legitimate decree-based expectations. However, the courts that have considered the constitutionality of the PLRA have failed to analyze how the PLRA fits into this Court's rulings involving retroactive legislation. Those courts have mistakenly relied on *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421 (1856), but that case merely recognizes that a change in the substantive law on which an injunction is based (which petitioners admit did not occur here) is a valid reason for modifying the injunction prospectively, particularly when the entity against which the injunction was issued (the bridge owner) was not the entity that made the change in the law (Congress). Surely, if an industry had obtained a decree against a federal agency that established a mutual set of rights and obligations like those in this decree, and if Congress passed a law allowing that agency to walk away from its duties, as

petitioners Miller *et al.* will be able to do here, this Court would scrutinize such a law with great care and not permit Congress to legislate retroactively in the absence of a substantial justification. The fact that respondents are prisoners, rather than businesses, should only heighten the need for scrutiny, given their lack of power and their inability to defend themselves in the legislative arena.

When properly examined as retroactive legislation, the PLRA must fall. The existing rights of prison officials to modify consent decrees, as set forth in *Rufo* and Rule 60(b) of the Federal Rules of Civil Procedure, provide them ample protection against changed circumstances, while assuring that both sides retain their bargained-for benefits. Similarly, the automatic stay provision, which shifts the burden from the party seeking to overturn an existing order to the party seeking to maintain it, not only interferes with the orderly judicial consideration of termination motions, and destroys reasonable and settled expectations of the beneficiaries of such orders, but is wholly unnecessary to protect the legitimate interests of prison officials who already have adequate abilities under Rule 60(b) to seek emergency modifications of court orders if they can establish the basis for doing so.

ARGUMENT

THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THESE PROVISIONS OF THE PLRA ARE UNCONSTITUTIONAL.

Before turning to the constitutional issue, we note our agreement with petitioner Miller (the "State") and respondents that the automatic stay provision is most reasonably construed as a bar to any further stays being issued by the federal courts. Try as it may, the United States cannot engender anything

approaching a reasonable doubt that Congress meant what it said when it established a firm deadline for district courts to rule on motions to terminate existing final judgments. As Justice Holmes, sitting as a Circuit Justice, said in *Johnson v. United States,* 163 Fed. 30, 32 (1st Cir. 1908), "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." If there ever were a case in which it was clear what Congress was "driving it" — it wanted courts to decide motions to terminate prisoner decrees within the time limits that Congress established – this is it.

Furthermore, the position of the United States does not eliminate the constitutional infirmity. It would allow additional stays but only if the party in whose favor the judgment exists proves both that it is likely to prevail (once again) and that it (not the defendant) will suffer irreparable harm if the automatic stay is imposed. That construction suffers from the same flaw as the State's, although its impact may be a little softer around the edges, because, under either view, Congress has stripped from prisoners the right to retain the benefits of a valid final judgment, until a federal judge can properly decide whether to modify it.

I. BECAUSE THE PLRA IS CLASSIC RETROACTIVE LEGISLATION, IT MUST BEAR A HEAVY BURDEN, WHICH IT CANNOT SUSTAIN.

A. The Meaning of Retroactivity

The theory on which the lower courts have upheld both the automatic stay and the ultimate termination provisions is that the relief being terminated is injunctive in nature and therefore is not subject to the final judgment rule. However,

that theory fails to take into account the fact that, in applying the PLRA to existing consent decrees, Congress has imposed new, and for respondents, highly disadvantageous rules for existing judgments and therefore enacted impermissible retroactive legislation. *See generally* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv L. Rev. 1056 (1997).

This Court's most recent and complete discussion of the objections to retroactive legislation is in *Landgraf v. USI Films Products*, 511 U.S. 244 (1994), where the Court construed the statute at issue not to apply retroactively. The opinion of Justice Stevens for the Court is relevant to this case in a number of respects. First, it defines retroactive legislation as that which "attaches new legal consequences to events completed before its enactment." *Id.* at 270. That description fits this situation like a glove, since the PLRA adds new rights for the State to obtain automatic stays of, and eventually to terminate, a series of judgments and consent decrees that have been entered over the past 20 years.

Second, the Court recognizes that there are constitutional objections to retroactive civil legislation. Although the Court has described the requirements of meeting them as "modest," *id.* at 272, in practice it has taken a close look at retroactive legislation, often striking it down under other constitutional doctrines. Third, it recognizes that the concerns about retroactive legislation are reflected in a number of specific constitutional provisions, such as the Ex Post Facto Clause, the Takings Clause, the Due Process Clauses, the Contract Clause, and the prohibition against Bills of Attainder. *Id.* at 266. Whether or not any of those specific prohibitions applies to this case, the policies behind them all support the Court's deep concerns over retroactive laws like the PLRA.

Fourth, a number of the specific objections voiced in *Landgraf* mirror this situation. Thus, the same "elementary considerations of fairness [that] dictate that individuals should have the opportunity to know what the law is and conform their conduct accordingly," that were found wanting in *Landgraf* because "settled expectations [were being] disrupted" (*id.* at 265) are being trampled on here. The PLRA has disrupted existing consent decrees and destroyed respondents' reasonable reliance on the inability of the State to walk away from its obligations, causing respondents to lose "confidence about the legal consequences of their actions." *Id.* at 266. Similarly, the PLRA affects "contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. At bottom, concerns about retroactive laws are about "fair notice, reasonable reliance, and settled expectations," *id.* at 270, each of which is at issue here.

Fifth, even if the PLRA could be viewed as a change in procedural rules, *Landgraf* eliminates any notion that such a label ends the inquiry: "Nor do we suggest that concerns about retroactivity have no application to procedural rules." *Id.* at 275 n. 29. Justice Scalia's concurring opinion underscores that point by his example that a change in a rule of evidence, which would be procedural, could not be applied to testimony already given. *Id.* at 291-92.

Finally, Justice Stevens points to a particular vice of retroactive legislation that relates to its equal protection component: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individual consideration. Its responsivity to political pressures pose a risk that it may be tempted to use retroactive legislation as a means of retaliation against unpopular groups or individuals." *Id.* at 266.

Last Term, in *Martin v. Hadix*, 119 S. Ct. 1998 (1999), this Court construed section 803(d)(3) of the PLRA, which limits the hourly rate for attorneys in prison litigation, not to apply to work performed before the effective date of the Act. Although the case was decided on statutory grounds, the opinions of Justice O'Connor for the majority, and Justice Ginsberg for the partial dissent, employ terminology that implicitly confirms the constitutional basis for the presumption against retroactivity. Thus, the majority spoke of "an impermissible retroactive effect" (*id.* at 2003), "retroactivity concerns" (*id.* at 2007), and "retroactivity problems" (*id.*), while the dissent twice described the effects of applying the law to litigation begun before the effective date as "impermissibly retroactive." *Id.* at 2011.

B. This Court's Retroactivity Decisions Invalidate the PLRA.

Most of this Court's decisions dealing with due process challenges to retroactive legislation have involved businesses that claimed that Congress added burdens to transactions that were already completed. For example, in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), Congress increased the withdrawal liability obligations of companies that participated in common pension funds, with an effective date five months prior to enactment. In sustaining the law, this Court noted that a statute's retroactive feature must be justified by a legislative purpose beyond that needed to sustain its prospective application. *Id.* at 730. Yet the defenders of the PLRA have offered nothing more than an assertion that existing decrees create obligations that they and Congress would prefer to eliminate. Obviously, if that rationale suffices, no retroactive law would be invalid.

The burden was satisfied in *Gray* because retroactivity was needed to remove incentives to avoid the new rules, and

the period of retroactivity was limited and narrowly tailored to achieve that end. *Id.* at 731. By contrast, in this case, there is no claim that non-retroactive application of the PLRA would facilitate avoidance of federal law, and the termination provision is permanent. Nor can the automatic stay be justified by the kind of practical argument employed in *Gray* since it is always open to the State to move to alter a judgment under Rule 60(b), including a request for preliminary relief under Rule 65, if it can meet the stringent requirements. What Congress cannot do is shift the burden to respondents to justify the continuation of existing orders, which is what would occur even under the interpretation urged by the United States.

Another example of close scrutiny of retroactive legislation is found in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), where this Court held that Congress had violated the Constitution by requiring companies that were no longer in the coal business to pay for health benefits for families of miners who once worked for them. Justice O'Connor, speaking for a plurality of four, found that the law was an unconstitutional taking; Justice Kennedy found the Takings Clause inapplicable, but he concluded that the retroactive application of the law bore "no legitimate relation to the interest which the Government asserts in support of the statute" and hence violated due process. *Id.* at 2159.

The differences between those opinions are less significant than their common themes. Both recognized the law's deep concern over retroactive statutes: Justice O'Connor described them as "generally disfavored," and Justice Kennedy noted "a singular distrust" of such laws. *Id.* at 2151, 2158. Their descriptions of what makes a retroactive law an unconstitutional taking or a violation of due process are also similar. As Justice O'Connor described the test, a retroactive law "might be unconstitutional if it imposes severe retroactive

liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 2149; *see also id.* at 2152-53 (focusing on the "distance into the past that the Act reaches back," the "unusual" nature of the act that "singles out certain employers to bear a burden that is substantial in amount"). Justice Kennedy's concern was with "severe retroactive legislation" that "destroys the reasonable certainty and security which are the very objects of property ownership." *Id.* at 2159. While the words are different, the approaches are quite similar, and both evidence a strong predilection against retroactive legislation.

Finally, both opinions cite cases relied on by the other and recognize that the Takings and Due Process Clauses are interrelated and tie in with other, similar constitutional limits on governmental power. *Id.* at 2149, 2151, 2153 (plurality), and 2157-58 (Kennedy, J.). Even the dissent of Justice Breyer, which was joined by Justices Stevens, Souter, and Ginsburg, noted the "potential unfairness of retroactive legislation" and agreed that a due process inquiry was appropriate to determine whether a law "is fundamentally unfair or unjust." *Id.* at 2163, 2164. In sum, there is "a bedrock principle with which all nine Justices seemingly concurred: the Constitution will not tolerate legislation that retroactively imposes unexpected liability on a party for a problem not of its own creation." *The Supreme Court -- Leading Cases, Eastern Enterprises v. Apfel*, 112 Harv. L. Rev. 212, 213 (1998); *id* at 218-22. Nonetheless, none of the courts of appeals that have reviewed the PLRA — both the automatic stay and the termination provision — have considered the PLRA from this perspective.[2]

---

[2] Both the majority and the dissent in *Martin v. Hadix*,

(continued...)

Another recent decision involving contract rights, *United States v. Winstar*, 518 U.S. 839 (1996), also directly supports the position of *amicus*. None of the *Winstar* opinions used the term retroactive legislation, but that is what was at issue. The Government had entered into contracts to bail out insolvent thrift institutions; in turn, the companies that acquired the thrifts were allowed to use certain favorable accounting devices to satisfy the capitalization requirements under the law. After the transactions were completed, Congress amended the law to forbid those accounting devices, thereby placing the acquiring companies in immediate violation of the law's capital requirements. The Court held that the Government could not avoid the obligations to which it had agreed and on which the companies had relied in contracting with the Government.

In one sense the law in *Winstar* was not retroactive since it operated only prospectively and did not cause a default

---

[2](...continued)
supra, described the relevant factors in assessing retroactivity in terms that closely resemble this due process analysis, although the two opinions disagreed about the applicability of those factors in that case. Thus, while Justice O'Connor spoke of "reasonable reliance" (*id.* at 2006), "reasonable expectations of the parties" (*id.* at 2007), and "no manifest injustice" (*id.*), Justice Ginsburg described the law as one that "significantly alters the consequences of [prior conduct]" (*id.* at 2011) and "frustrates reasonable reliance on prior law" (*id.* at 2012). Justice Scalia's concurrence would make retroactivity turn on whether the law affected "primary conduct" (*id.* at 2008). Since respondents' "primary conduct" was the decision to enter what they believed was a mutually-binding consent decree, the law would have an impermissible retroactive effect on them under Justice Scalia's approach as well.

for events that occurred prior to its effective date. But it was surely retroactive as the Court defined that term in *Landgraf* since it clearly "attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. Because the accounting practices that were permitted beforehand were subsequently banned by Congress, the companies were unable to continue with the transactions on which those practices were based, just as if Congress had passed a law terminating the prior agreements with the Government, as Justice Souter recognized. *Id.* at 878 n.22.

Moreover, many of the policy concerns underlying the majority and concurring opinions in *Winstar* support a holding that the PLRA is unconstitutional because of its severe retroactive impact. In particular, the *Winstar* Court was deeply troubled by the Government's claim that it could upset the entirely reasonable reliance interests of those with whom it had contracted and shift the costs occasioned by the change in law to them, just as was attempted in the other retroactivity cases. As Justice Scalia put it, if the Government can change its obligations by enacting a new law, then the PLRA is "an absolutely classic description of an illusory promise" (*id.* at 921), which is what the consent decree here will become if the PLRA is upheld.

Another case in which this Court declined to apply a law having retroactive application is *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). Again, like *Winstar*, the Court did not describe the law as retroactive, but there is no doubt that it was. Congress had authorized the confiscation of property of those who aided the Confederacy in the Civil War, but a prior statute had allowed the President to pardon those who had fought on the other side. This Court then ruled that a person who was pardoned was entitled to avoid confiscation, to which Congress responded by passing a law saying that a pardon

could not be offered in evidence to defeat confiscation. Mr. Klein argued that Congress did not have the authority to alter the outcome of his case, in which the United States Government was his adversary, and this Court agreed. Again, while the language of the decision is not that of a challenge to a retroactive law that benefitted the United States, that is surely what was at stake for those like Mr. Klein who had applied for a pardon and taken an oath to support the United States before Congress acted.[3]

Similar concerns animate this Court's regulatory takings decisions, such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, new zoning rules effectively eliminated all significant previously allowed uses for the property owner's beachfront land, thereby rendering his investment almost worthless. In balancing the state's interest in land use regulation against the property owner's reasonable investment-backed expectations, the Court held that major changes in the lawful uses of property would require compensation by the state, except when "background principles of nuisance and property law" made such changes reasonably foreseeable. *Id.* at 1030. Seen from this perspective, the zoning change in *Lucas* was like the imposition of major new financial obligations in *Eastern Enterprise* or *Winstar*, in contrast to the modest and foreseeable change in *PBGC v.*

---

[3] In an apparent effort to camouflage the retroactive and substantive nature of the change in the law, Congress put the prohibition in terms of evidence that could be heard and also sought to bar this Court from reviewing cases in which a pardon had been set up as a defense to confiscation. 80 U.S. at 143. Neither device fooled the Court or prevented it from striking down the law as applied to Mr. Klein (and presumably others similarly situated).

Gray. As applied to this case, the "background principles" of law are Rule 60(b) and cases like *Rufo* interpreting it, which contain express, but limited, exceptions to the rule that consent decrees (and litigated judgments) can be altered only if all parties agree. They also govern how motions to modify those decrees should proceed procedurally, which does not include anything like the automatic stay provision of section 802(e)(2).

Two cases from the 1930s confirm that the Takings Clause also reaches retroactive laws when they affect rights between private parties. Thus, in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 578 (1935), the Court struck down a federal statute that significantly altered the rights of holders of "pre-existing mortgages." As the Court explained, "the Act is retroactive in terms and as applied purports to take away rights of the mortgagee in specific property" that had been acquired by the bank prior to passage of the Act. *Id.* at 589, 590. The statute was not infirm because it compromised the debt of the farmer who owned the property, but because it produced "a substantial impairment of the security" given to protect the lender. *Id.* at 595. While Justice Brandeis recognized that a different mortgage contract might have afforded the farmer the protections that Congress granted him, that did not permit Congress to alter rights under contracts already executed -- in that case more than ten years before Congress acted. *Id.* at 596. Similarly, in *Lynch v. United States*, 292 U.S. 571, 579 (1934), an attempt to invalidate the Government's contractual obligations to pay on War Risk Insurance policies was rebuffed under the Fifth Amendment's Taking Clause: "Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States." In this case the Court need not decide whether these consent decrees are "private property" within the meaning of the Takings Clause, because there can be no doubt that the rights created under them are either "property" or "liberty"

within the broader protections accorded by the Due Process Clause.

Finally, the relation between retroactive legislation and the concepts of settled expectations and reasonable reliance is illustrated by *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). At issue there was the right of the Government to insist that companies wishing to sell certain pesticides disclose trade secret information. In striking the balance between the competing interests, the Court drew the line based on whether the disclosure requirement was in place when the pesticide application was submitted. *Id.* at 1007. Where it was, disclosure could be required because, as the *Lucas* court might put it, "background principles" of law would no longer protect the pesticide maker's claimed right of confidentiality.

Applying these principles to the PLRA would surely require its invalidation. The decrees in this case have been entered over a 20 years period, during which respondents had no notice of any possibility that the decrees could be terminated, or even automatically stayed, except for reasons provided in the decree or in the law of equity. Respondents gave up short-term benefits for long-term security, but if the PLRA is upheld, they will be deprived of a substantial portion of their bargain. Petitioners have offered no justification for the PLRA other than the fact that federal and state prison officials would prefer to be relieved of obligations that they undertook in exchange for agreements by prisoners not to continue with their lawsuits. Balancing respondents' reasonable reliance on the expectations arising from the consent decrees, against the lack of any basis for retroactivity other than a desire by prison officials not to be subject to court orders dealing with their prisons, the PLRA plainly constitutes "impermissible

retroactive" legislation.[4]

II. Of the Two Principal Cases Relied on by Petitioners, One (*Plaut*) Supports the Foregoing Retroactivity Analysis, and Nothing in the Other (*Wheeling Bridge*) Undermines It.

In *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219 (1995), this Court sustained a challenge to an act of Congress that "retroactively commands the federal courts to reopen final judgments" by extending the statute of limitations after the time for appeals from those judgments had expired. The defendants had argued against retroactivity on both due process and separation of powers grounds, but the Court ruled on what it called the narrower separation of powers basis since the alternative ground would have implicated state as well as federal statutes. *Id.* at 217.

Justice Scalia's opinion focuses on the special dangers of legislative overrulings of judicial decisions, including the historical basis in separation of powers for such concerns. And his conclusion that there must be a "categorical" invalidation of

---

[4] All of the cases cited above involved retroactive economic legislation, and some of the Court's statements are expressly qualified by the term "economic." *Amicus* is not aware of any cases in which non-economic retroactive legislation has been challenged in court. But given this Court's general practice of providing very limited review of economic legislation, and since the PLRA infringes on respondents' ability to obtain vindication of their constitutional right to humane treatment, the standard of review here should be at least as rigorous as in economic rights cases.

legislative attempts to alter judicial judgments, *id.* at 240, is appropriate only under a separation of powers analysis since, under a due process/retroactivity analysis, a balancing of the interests is required. But his concerns about overturning settled (finalized) expectations extend to all retroactive legislation, not just that affecting court judgments (*id.* at 219, 227), as illustrated by the portions of his opinion that mention other parts of the Constitution that guard against retroactive laws. *Id.* at 237-38.

The opinion is most relevant for the PLRA when it rebuts the claim that the change in the statute of limitations can be saved by analogy to Rule 60(b). *Id.* at 233-34. The opinion acknowledges that Rule 60(b) refutes the notion that final judgments can never be reopened, but the Court specifically held that the standards contained in that Rule may not be expanded by Congress by imposing "a reopening requirement which did not exist when the judgment was entered" (*id.* at 234) — once again an exact description of the impact of the PLRA in this case.

One of the major flaws in petitioners' briefs is their failure to recognize that the principles in *Plaut* extend beyond the stated Article III basis of the decision. Suppose that the case in which the statute of limitation was extended had been litigated to final judgment in a state court. *Plaut* would not literally apply, and a decision in that case would probably not produce the kind of categorical outcome mandated in *Plaut*. But surely this Court would have to examine the impact of the law under the principles of retroactivity described above and confirmed by *Plaut*.

Or suppose that the NLRB had awarded back pay to workers in a dispute with their employer, or the FCC had resolved a contest between two broadcasters over the right to a

radio license, or two businesses had concluded a private arbitration under the Federal Arbitration Act. Suppose further that, after each of those determinations became final, Congress passed a law that altered the outcome of those cases. The fact that none of those cases reached a court of any kind would not make the concerns underlying *Plaut* irrelevant. Rather, the victor in those three proceedings would have the same type of grievance that the defendant had in *Plaut*: a decision that each had every reason to believe was final but would no longer be valid because of a retroactive statute.

There is also no rationale for limiting the triggering event to Congress passing a law, even though that was the focus of this Court's separation of powers discussion in *Plaut*. For example, suppose that the times for petitioning for rehearing in the courts of appeals, or for seeking a new trial in the district courts — both of which are set by the judicial branch — were extended *after* the existing times had expired. In those situations, the retroactive effect would be the same as in *Plaut*: a final judgment would be reopened. If the determinative fact in *Plaut* were that Congress had stepped in, then the parties in those cases who had their victories re-opened would lose their challenges to the retroactive application of the new timing rules. But surely the basic policy reasons behind *Plaut* would apply in the case of judicial interference as well since the impact on the parties in both situations is identical.[5]

---

[5] The fact that a change in the law would not necessarily cause the original losing party to win the case, rather than simply getting to try again, is irrelevant since in *Plaut* itself the new law only removed the bar of the statute of limitations, but did not assist the plaintiffs in establishing their claims on the merits.

In our view, *Plaut* is an extreme example of the reasons why this Court has long expressed very serious concerns about retroactive legislation. There, the legislative branch not only unsettled settled expectations, but also directly overruled a determination by a coordinate branch of government, whose constitutional function is to decide the legal effects of completed transactions. For that reason, the statute in *Plaut* directly infringed the constitutionally-mandated independence of another branch of government, as well as injuring the parties for whom the rule of law was retroactively changed. But as the cases cited above demonstrate, there are broader principles underlying *Plaut*, and those principles apply to invalidate the PLRA as well.

The lower courts that have upheld the PLRA have done so primarily because of their reading of *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421 (1856). Properly read, *Wheeling Bridge* does not bear anywhere near the weight that most courts and petitioners place upon it. Indeed, even the dissent in *Taylor v. United States,* 181 F.3d 1017 (9th Cir. 1999) (*en banc*), while voting to uphold the PLRA, recognized that the impact of *Wheeling Bridge* is less clear and not nearly so important as other courts have believed. *Id.* at 1037.

Wheeling Bridge began with a suit by Pennsylvania to have the bridge declared an obstruction to the river which was used to transport goods from Pennsylvania ports. The problem was that the height of the bridge required vessels to lower their pipes to get under it, which was very expensive and time-consuming. Pennsylvania's claim was that the bridge was contrary to congressional enactment and an obstruction to navigation, and this Court agreed. *Pennsylvania v. Wheeling & Belmont Bridge v. Pennsylvania,* 54 U.S. (13 How.) 518, 565-66 (1852). Congress then passed a law permitting the bridge to

remain in place, and Pennsylvania challenged that law.

This Court held that the injunction against the bridge must be lifted because "there is no longer any interference with the enjoyment of the public right [of passage] inconsistent with the law." 59 U.S. at 432. In other words, because the federal statute on which Pennsylvania relied to obtain its injunction was no longer in effect, the State no longer had any right to prevent the use of the bridge.

Wheeling Bridge is cited by petitioners and various lower courts in defense of the PLRA for the proposition that an injunction is never final and can always be modified by the legislature. But that view is overly expansive. The principal import of *Wheeling Bridge*, on which there is no disagreement, is that, when the substantive law that formed the basis of an injunction is changed, the injunction can and must be modified. Indeed, that appears to be the limited proposition for which Justice Scalia cited *Wheeling Bridge* in his concurring opinion in *Martin*, *supra*, 119 S. Ct. at 2009.

That proposition, however, simply mirrors existing law in Rule 60(b)(5) that allows modification when it is "no longer equitable that the judgment should have prospective application." That principle does not apply here because the substantive law of the Eighth and Fourteenth Amendments, on which these consent decrees were based, has not been changed, and indeed Congress lacks the power to do so. Nor, as *Plaut* establishes, can Congress bootstrap its way out of that limitation by adding a new ground for terminating existing consent decrees under Rule 60(b), which is the effect of the retroactive termination aspects of the PLRA. Instead, the Court must examine the retroactive aspects of the PLRA, including its impact on existing injunctions, under the standards set forth above and in light of the existing provisions of Rule 60(b).

Wheeling Bridge may have some bearing on that analysis, but it is not the "get out of jail free card" (or, more accurately, the "get out of consent decree free card") that petitioners and many lower courts contend that it is.

There is one other aspect of *Wheeling Bridge* that bears noting: the party against whom the injunction was issued and that benefitted from a change in the law (the bridge owner) was not the sovereign that changed the law (the United States). The absence of this kind of a self-serving element in *Wheeling Bridge*, in contrast to cases like *Klein* and *Winstar*, further undercuts the inapplicability of *Wheeling Bridge* in this situation since the PLRA's benefits accrue to both federal and state prison officials against whom existing decrees were pending when Congress enacted these retroactive provisions.

Finally, although we believe that, for most purposes, and surely for purposes of the retroactivity analysis set forth above, there is no constitutional difference between the automatic stay provision in section 802(e)(2) and the termination provision in 802(b)(2), we agree with the argument made in respondents' brief that there is one respect in which the automatic stay provision presents additional constitutional objections. Apart from its retroactive aspect, the automatic stay is an unreasonable intrusion on the proper working of a coordinate branch of government and is unconstitutional for that reason. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). Under *Nixon v. GSA*, there is a violation of separation of powers if the law "prevents the . . . [b]ranch from accomplishing its constitutionally assigned function" unless that "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.*

Here, it is apparent that imposing an automatic stay on all existing court orders, unless a congressionally imposed deadline is met, in effect, forces Article III judges to decide a motion to terminate without giving the matter the attention to the facts and law that the judge believes it deserves. In essence, these kinds of rigid deadlines deny Article III judges the ability to carry out their constitutionally assigned judicial functions. Moreover, there is no "overriding need" here since Rules 60(b) and 65 already provide petitioners with a full opportunity to modify existing decrees if circumstances truly warrant a change. The real reason that the termination provision in section 802(b)(2) was enacted was that Congress and prison officials did not like the existing final judgments that federal courts had entered, and so Congress decided that it would do something about them, legislatively and retroactively. As part of its package, Congress decided to tie the hands of federal judges by forcing them to act on motions to terminate within unreasonably short deadlines, and directing that, if they did not, the decrees would immediately vanish, at least until the judges acted on the termination motions. That kind of legislative interference with judicial decisionmaking is forbidden by separation of powers, even if imposed only on a prospective basis. This rationale provides a further basis for striking the automatic stay in section 802(e)(2), while leaving the constitutionality of the termination provision in section 802(b)(2) to another day.

CONCLUSION

The judgment below should be affirmed.

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
1600 20th Street, NW
Washington DC 20009
(202) 588 7720
Attorneys for Public Citizen

March 6, 2000